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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1374

LEONARD W. GRANGER, et al.,
Petitioners,

v.

CITY OF MENTOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI

~~To the Supreme Court of Ohio.~~

TO THE LAKE COUNTY COURT OF COMMON PLEAS OF OHIO

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CITATIONS TO OPINIONS BELOW.

This action was instituted in the Court of Common Pleas of Lake County, Ohio. The opinion issued by that court is not reported but it is reproduced at pages 5-7 of the appendix to this petition.

JURISDICTION.

The decree of the Lake County Court of Common Pleas sought to be reviewed was filed on February 16, 1970.

The Ohio State Supreme Court is the highest appellate Court in the State of Ohio and refused to hear this case, issuing its final order denying a rehearing on November 25, 1970. A Copy of said order is reproduced at page 8 of the Appendix to this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED.

Did the Respondent acting through its City Council and Planning and Zoning Commission abuse its police power in an arbitrary, unreasonable and unconstitutional manner by requiring the Petitioners to sign an option to sell certain lands to the Respondent as a condition to the issuance of a sand removing permit to the Petitioners, thereby in effect taking the Petitioners' property without due process of law in violation of Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved is that part of Section 1 of the 14th Amendment to the Federal Constitution which reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF THE CASE.

On February 12, 1964, the Petitioners submitted an application for a permit to remove sand to the Respondent. The Petitioners were at that time in the sand and gravel business, and the land on which they sought the permit to remove sand from was the only land the Petitioners possessed that was suitable for such sand removal and in order to stay in business, the obtaining of the sand removal permit by the Petitioners was imperative.

The Petitioners were informed that in addition to the twelve conditions set forth in the Petitioners' application

(said application reproduced at pages 9-10 of the appendix to this petition), one other condition must be met by the Petitioners before a permit would be issued, that added condition being, the signing of an option by the Petitioners, granting to the Respondent the right to purchase the Petitioners' property on which the sand was to be removed from plus additional property the Petitioners owned.

In order to obtain the sand removal permit, the Petitioners signed the option demanded by the Respondent and on June 24, 1964 the Respondent issued the permit to the Petitioners, said permit clearly stating that one of its conditions was "option to purchase the Granger Property dated March 31, 1964" (permit reproduced at page 11 of the appendix to this petition).

The Respondent sought to enforce the option signed by the Petitioners by filing suit in Lake County of Ohio Common Pleas Court, the federal question sought to be reviewed was first raised in their pleadings by the Petitioners, and during the trial of the case by stipulation and the introduction of both the application for the permit, and the permit itself as exhibits, said exhibits and stipulations being admitted as evidence by the trial court at pages 3, 19, and 20 of the official transcript of the proceedings. The federal constitutional issue was also raised at trial when the Petitioners in their motion for a directed verdict brought to the Court's attention at page 6 of the official transcript of the proceeding that "The defendants are entitled to have a jury set the price of this land rather than to allow the City to come by it in the manner which they desire to."

The trial court ruled against the Petitioners on all these matters and rendered its judgment upholding the option on February 16, 1970.

REASONS FOR GRANTING THE WRIT.

The Lake County Common Pleas Court of Ohio has decided a federal question of substance not heretofore determined by the Supreme Court of the United States, namely, "Is it an arbitrary and unreasonable abuse of its police power for a Planning and Zoning Commission to require applicants for a permit that the applicants are legally entitled to; to tender to the Planning and Zoning Commission an option to purchase some of the applicants' real estate as a condition to the issuance of the sought permit, thus in effect taking the applicants' property without due process of law?"

The Petitioners believe that to allow the decision of the Lake County Court of Common Pleas to stand in this case would be to open the door to a serious and dangerous encroachment by governmental bodies on the individual property rights of citizens by circumventing eminent domain and appropration proceedings which are the proper steps to take by a governmental body taking private property.

For the foregoing reasons, Petitioners pray that a writ of certiorari be issued as above set forth.

Respectfully submitted,

FRANK J. GAVIN, JR.,
Attorney for Petitioners.

APPENDIX.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

Case No. 49063.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, COUNTY OF LAKE, SS.

CITY OF MENTOR,
8383 Mentor Avenue,
Mentor, Ohio,
Plaintiff,

vs.

LEONARD W. GRANGER,
8181 Plains Road,
Mentor, Ohio,

and

BELLE M. GRANGER,
8181 Plains Road,
Mentor, Ohio,
Defendants.

This cause came on to be heard on the Petition of Plaintiff, the Amended Answer of Defendants, the Amended Reply of Plaintiff and the evidence, on consideration whereof the Court finds that Plaintiff has in all respects performed the terms, provisions and conditions on its part to be performed in the exercise of the options set forth in its First and Second Causes of Action, including giving notice of the exercise of said options, and depositing of funds with the Land Title Guarantee and Trust Company as Escrow Agent.

The Court further finds that there was no physical or legal duress by Plaintiff in securing said options, and Plaintiff is entitled to a warranty deed from Defendants to

Plaintiff, warranting the premises described in Plaintiff's First and Second Causes of Action to be free and clear of all liens and encumbrances, except taxes and assessments for the year 1969 and thereafter, subject to the pro-ration thereof as of the date of filing said deed for record, and subject to zoning ordinances of the City of Mentor, Lake County, Ohio, said premises being described as follows:

* * * * *

(Legal description of property omitted in printing.)

It is further ordered that Defendants furnish to Plaintiff a title guarantee by the Land Title Guarantee and Trust Company in the amount of Thirty Five Thousand Dollars ($35,000.00) as to the first, second and third parcels above described, and in the amount of One Thousand Five Hundred Dollars ($1,500.00) as to the fourth parcel above described, guaranteeing said premises to be free and clear of all liens and encumbrances, except taxes and assessments for the year 1969 and thereafter, and subject to zoning ordinances of the City of Mentor, Lake County, Ohio.

It is further ordered that the cost of said title guarantee be assessed as part of the costs of these proceedings and which costs in total shall be paid by the Defendants.

It is further ordered that Plaintiff be and is hereby given the right of entry upon and possession of the premises hereinbefore described upon filing of this decree with the Clerk of this Court.

It is further ordered that upon said conveyance from Defendants to Plaintiff as herein ordered, Plaintiff shall cause the funds deposited by it with the Land Title Guarantee and Trust Company to be paid to Defendants after deducting therefrom the costs of these proceedings, including the cost of title guarantee, transfer tax, if any, and

taxes and assessments pro-rated from the first day of the current year to the date of transfer of title to Plaintiff.

It is further ordered that in the event of default by the Defendants in the execution and delivery of said deed conveying said premises to Plaintiff within ten (10) days from the date of filing of this decree with the Clerk of this Court, this judgment shall have the operation and effect of such deed and the Clerk shall have a copy of this decree recorded in the office of the Recorder of Lake County, Ohio.

Exceptions noted for Defendants.

ORDERS OF THE SUPREME COURT OF OHIO.

No. 70-379.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

CITY OF MENTOR,

Appellee,

vs.

LEONARD W. GRANGER *et al.*,

Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR LAKE COUNTY TO CERTIFY RECORD.

October 21, 1970:

It is ordered by the Court that this motion is overruled.

REHEARING.

November 25, 1970:

It is ordered by the court that rehearing in this case is denied.

APPLICATION FOR PERMIT.

February 12, 1964

Building Inspector of the City of Mentor
Mentor City Hall
Mentor, Ohio

Re: Application for permit
to remove sand

Application is hereby made under Sec. 237.01 of Mentor City Ordinances for a permit to remove sand from the rear portion of certain lands now owned by Stanley & Rose Bradack on Plains Road, Mentor, Ohio. In connection therewith you are hereby advised as follows:

1. The applicant is Leonard W. Granger, d.b.a. Granger Sand Co. whose address is 8151 Plains Road, Mentor, Ohio.
2. The description of the land from which the sand is to be removed is attached hereto and incorporated herein.
3. The owners of the land described herein are Stanley and Rose Bradack whose address is 8189 Plains Road, Mentor, Ohio.
   The owners consent to the removal of the sand as herein set forth is attached hereto.
4. The method of removal to be employed will be by Dragline operation.
5. The time within which the work will be commenced will be as soon after the permit is granted as possible. The work will be completed in approximately three (3) years.
6. After the sand is removed the banks and slopes along the edges will be reseeded to grass. The rest of the area where sand has been removed will become part of the present lake which adjoins this property.

7. The average depth of the sand to be removed is about 15 feet. The amount of sand to be removed is estimated between 155,000 to 160,000 cubic yards. The amount which would remain would be about 5000 cubic yards along the east side of the property described.
8. The method of drainage to be used during the operation will be the natural flow to the Northwest and into the existing lake. A sketch of the topography of the land after the removal is attached hereto.
9. The ultimate proposed use of the land after the removal will be a lake.
10. There is no refilling contemplated as the area will be a lake.
11. The applicant is willing to bear a reasonable expense for a City Inspector during the operation under the permit.
12. The applicant is capable of and will furnish a performance bond in the amount of $500.00 for each acre or fraction thereof included in said permit.

You are respectfully requested to report this application and your findings to the Planning and Zoning Commission at your earliest convenience and request of said commission a hearing on this application at their earliest convenience, and to advise this applicant the date when the hearing will be held.

This application signed this ____ day of February, 1964.

Leonard W. Granger, d.b.a.
Granger Sand Co.

By: _____
his agent

PERMIT ISSUED TO PETITIONERS.

MUNICIPALITY OF MENTOR
8383 Mentor Avenue
Mentor, Ohio

June 24, 1964

Granger Sand Company
8151 Plains Road
Mentor, Ohio

Attention: Mr. Robert L. Granger

Subject: Sand Removal from Bradack property

Dear Sir:

By decisions of the Mentor City Council and the Planning and Zoning Commission as defined in Chapter 37 (237.01) of the codified ordinances of the City of Mentor, you are are hereby authorized to proceed with the excavation and removal of sand from the 6.71 acre Bradack property (at the rear of their property on Plains Road) subject to the following conditions:

Tabulation of 12 items of information dated February 12, 1964 as required in section 237.01-1.

Option to purchase the Granger Property dated *March 31, 1964.*

That a 60 foot wide strip be left unexcavated along the east and south sides of the Bradack property, accessable for a roadway and parking.

Yours very truly,

/s/ J. Richard Reed,
Supt. of Building & Zoning.

JRR: mhr

cc Wayne Davis, City Solicitor
R. L. Moon, City Manager

Enclosure

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

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ARGUMENT AGAINST CERTIORARI.

There are no special or important issues involved here; no instance of State override of any Federal constitutional right.

Petitioners and the City executed an option contract in 1964 for the purchase of a parcel of land the former owned for a price that reflected its appraised value, as determined by an independent appraiser. The City subsequently exercised its option and petitioners reneged, claiming the price was insufficient.

True, the parcel's market value had increased in the interim. But surely that does not invalidate an option to buy, nor constitute its exercise by a public body deprivation of property without due process.

Counsel for petitioners ignores the evidence submitted to the Trial Court by his phrasing of the Question

Presented on page two of the petition. The City did *not* compel the options as a condition to issuance of a sand removal permit. *They were voluntarily executed.* This was the conclusion of the Trial Court in its Separate Findings of Fact:

> "1. That the options granted by the Defendants to the City of Mentor, being Exhibits 1 and 2 herein, were properly and voluntarily executed and delivered by the Defendants to the City of Mentor.
>
> "2. That said options, being Exhibits 1 and 2, upon exercise thereof, became a valid, binding and enforceable contract for the sale of said premises upon the terms and conditions set forth therein.
>
> "3. That the execution and delivery of said options by the Defendants to the Plaintiff was without any coercion or duress, physical or legal."

And, as stated in the Trial Court's Journal Entry ". . . there was no physical or legal duress by Plaintiff in securing said option . . ." (Petition for Writ of Certiorari, p. 5).

This Court does not review such evidential disputes or determinations, *Grayson v. Harris,* 267 U.S. 352, 358 (1924); *Portland Railway Company v. Railroad Commissioner,* 229 U.S. 397, 412 (1912); *Fry Roofing Company v. Wood,* 344 U.S. 157, 160 (1952).

The judgment of the Trial Court was sustained by the 11th District Court of Appeals of Ohio. Certification was refused by the Ohio Supreme Court on the grounds that there was no constitutional issue and no question of great public interest. The Supreme Court refused a rehearing on Petitioner's Motion.

The City is anxious to begin developing the parcel for municipal use. It has been waiting to do so since 1968. We appeal to the Court to refuse the Writ and allow us to proceed.

CONCLUSION.

Certiorari should be denied.

Respectfully submitted,

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